FILED
MAY 31 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARTIN ALAN BEVARD,

Petitioner-Appellant,

vs.

CALVIN AUGER, Warden, Anamosa Men's Reformatory, Anamosa, Iowa,

Respondent-Appellee.

Filed May 31, 1983

3-37
2-68118

Appeal from Black Hawk District Court - L. D. Liebert, Judge.

Petitioner appeals from the order of the trial court denying his application for posteonviction relief under Iowa Code ch. 663A. AFFIRMED.

Alfredo G. Parrish of Parrish & Del Gallo, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Petitioner appeals from the order of the trial court denying his application for postconviction relief under Iowa Code ch. 663A. He claims that he was given ineffective assistance of counsel in connection with his guilty plea to sexual abuse and third-degree kidnapping and with counsel's advise to dismiss his direct appeal in the mistaken belief that he might have been eligible for shock sentencing. We affirm.

In October, 1979, Bevard was charged with first-degree kidnapping and third-degree sexual abuse, arising out of the alleged abduction and rape of a Waterloo woman. The minutes of testimony alleged that after Bevard's truck and the victim's automobile were involved in an accident, Bevard forced the victim into his truck and drove her to a Waterloo high school where he sexually assaulted her on the school's front lawn.

In March, 1980, pursuant to a plea bargain, Bevard pled guilty to third-degree sexual abuse and third-degree kidnapping. He was subsequently sentenced to concurrent indeterminent ten-year terms of imprisonment on each charge. Bevard's direct appeal was voluntarily dismissed in August, 1980. An application to reinstate the appeal was denied in October, 1980. In December, 1980, Bevard filed the instant application for postconviction relief, raising for the first time his claims of ineffective assistance of trial and appellate counsel. Following a hearing, postconviction relief was denied in November, 1981.

In a postconviction proceeding alleging ineffective assistance of counsel, the petitioner has the burden of proving his claim by a preponderance of the evidence and must overcome a presumption that counsel is competent. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). We determine whether counsel's performance was within the range of normal competency under all the circumstances which must include an affirmative factual basis demonstrating the inadequacy of counsel's

representation. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

> The required examination should proceed while resisting, in the light of hindsight, the temptation to Monday morning quarterback the lawyer in the arena. Nor should the inquiry degenerate into a postmortem, microscopic dissection of each desperate effort of counsel to save a terminal case.
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> > [E]ffective assistance of counsel does not mean successful. Rather, it denotes conscientious, meaningful legal representation wherein the accused is advised of his rights and honest, learned and able counsel is accorded reasonable opportunity to perform his assigned task. Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel. (citation omitted).

Id. at 30-31.

I. Bevard first claims that he was given ineffective assistance of counsel during pretrial preparation and the guilty plea proceedings. Bevard was represented at the plea proceeding by attorney Kjas Long. Prior to that proceeding Long made arrangements for Bevard to take a lie detector test, and entered into an agreement with the prosecutor to dismiss the charges if Bevard passed the test and to admit the results at trial if he failed the test. Bevard then failed the lie detector test. After Long negotiated the plea bargain, Bevard signed written guilty plea forms. At the postconviction proceeding Bevard claimed that he had suffered chest pains during the polygraph examination and that he suffered dyslexia and therefore failed to understand the written plea forms.

Bevard raises three specific allegations in this regard, the first being that Long failed to give him a full and adequate explanation of the guilty plea process. The record indicates the contrary. Long testified that he went through the plea with Bevard who in turn testified that there was nothing in the proceedings he did not understand. In addition, the transcript of the plea proceeding indicates that the court went to great lengths to ensure that Bevard understood the consequences of his decision to plead guilty.

Next, Bevard claims that Long should not have advised him to plead guilty based on the results of the lie detector test. First, the record does not support his contention that the results of the test were the determining factor in deciding to plead guilty. Long interviewed a number of the State's witnesses including the victim. Based upon the information obtained in those interviews and upon his conclusion that the victim would appear credible to a jury, Long advised Bevard to plead guilty to lesser charges. Second, Bevard was made aware of how the test worked and the consequences of his passing or failing and then agreed to undergo the test. This was based on the agreement reached with the prosecution whereby the charges against Bevard would be dismissed if he passed the test but evidence of his failure could be used against him. The fact that he failed the test was certainly unfortunate for him, but it does not render incompetent the original strategy and the subsequent advice to take the guilty plea.

Bevard claims that the results of the lie detector test may have been affected by his high blood pressure and other physical problems. Long was not made aware of any such problems nor does the record indicate any reason to indicate that he should have known. In fact, Bevard himself did not know he had high blood pressure until months after the test was conducted. We refuse to impose a duty on attorneys to make a full inquiry into their clients' medical problems where, as in this case, there is no indication that any such problems exist and the client says nothing indicating their presence.

Bevard's last allegation in this area is that Long was ineffective in failing to determine if there was a factual basis in the record for the plea of guilty to the kidnapping charge and in failing to file a timely motion to arrest judgment to challenge the plea on that basis. A factual basis for a guilty plea may be established in one of four different ways: 1) inquiry of the defendant; 2) inquiry of the prosecutor; 3) examination of the presentence report; or 4) reference to the

minutes of testimony. State v. Victor, 310 N.W.2d 201, 205 (Iowa 1981). In this case, the prosecutor set forth the factual basis for both the kidnapping and sexual abuse charges as follows:

> We would call the victim in this case, Gale Elaine Thein, to testify in this trial and very briefly, Your Honor, she would testify that in the early morning hours of September 15, 1979, she was driving from her mother's house to her own home and that during the time that she was driving she was on Ridgeway Avenue and that the defendant's truck struck her car from behind. That while she was in her car, the defendant approached her and asked if she was all right. She indicated that she was and got out to look at the damage. That at that time she was looking at the damage, the defendant assaulted her, twisted her arm and placed her in his truck. That he thereafter drove from the intersection where they were to the lawn of the West High School here in Waterloo. Drug her out of the truck and forcibly sexually assaulted her on the lawn of West High School. That he did make penetration of her vagina with his penis constituting the sexual act. That this was against her will and that she was fighting and struggling against him. And that she was forcibly removed from the intersection where the accident took place to the lawn of the West High School and that that was without her authority or her consent. And that all of the acts that the defendant committed were without her authority or consent.

We believe this to provide a sufficient factual basis for the kidnapping charge. See, e.g., State v. Knupp, 310 N.W.2d 179, 182-83 (Iowa 1981).

Since there was an adequate factual basis for the guilty plea and since the plea proceedings were otherwise free from defect, there was no basis for filing a motion in arrest of judgment. Long's actions on Bevard's behalf in pretrial preparation and during the guilty plea proceedings were well within the normal range of competence. The trial court was correct in so holding.

II. Bevard also claims ineffective assistance of counsel regarding the advice given him to dismiss his direct appeal based on counsel's mistaken belief that shock sentencing would be available under Iowa Code § 902.4. After sentencing, Long advised Bevard to dismiss his appeal; he received similar advice from attorney Richard Knock. At the postconviction proceeding Bevard claimed these

attorneys told him he would receive shock sentencing, even though the crimes to which he had pled guilty were forcible felonies. At the time the appeal was discussed with Bevard, it was uncertain whether shock sentencing was available in forcible felony cases. It was the attorneys' opinion that it was in fact available; their advice to dismiss the appeal was based on that opinion. Subsequent to those discussions and after the appeal was dismissed, the supreme court held that shock sentencing was not available for those convicted of forcible felonies. State v. Broten, 295 N.W.2d 453 (Iowa 1980).

Bevard claims that Knock's advice regarding the possibility of shock sentencing or early parole in connection with counsel's opinion that Bevard would not have to spend much time in prison constituted ineffective assistance of counsel. We disagree. Knock cannot be faulted for not knowing how the supreme court would rule in the Broten case at the time he advised Bevard concerning the possibility of shock sentencing or when that decision would be handed down. In addition, Bevard was cautioned at all times that shock probation was only a possibility based upon Knock's understanding of the law at that time; Bevard was at no time given any guarantees that Knock's strategy would be successful. He testified that he was made aware of the various sentencing possibilities and knew the chances he was taking by dismissing his appeal. Under these circumstances, we reject his claim of ineffective assistance of counsel in connection with the dismissal of his direct appeal.

We concur with the district court's conclusion that the services provided by both attorneys, Long and Knock, were well within the range of normal competence. The order denying Bevard's petition for post-conviction relief is affirmed.

AFFIRMED.